STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Illinois Commerce Commission	**)**	
On Its Own Motion	**)**	
Implementation of Section 13-712(g)	**)**	**Docket No. 01-0539**
of the Public Utilities Act	**)**	

BRIEF IN REPLY TO EXCEPTIONS OF AT&T AND WORLDCOM

INTRODCUTION

Pursuant to the schedule established by the Administrative Law Judge ("ALJ") in the May 30, 2003 scheduling Notice, and Section 200.830 of the Rules of Practice of the Illinois Commerce Commission ("Commission"), AT&T Communications of Illinois, Inc., TCG Chicago, TCG Illinois, and TCG St. Louis (collectively called "AT&T") and WorldCom, Inc. ("WorldCom"), respectfully submit this joint brief in reply to exceptions.

AT&T/WorldCom will address certain arguments raised in the Briefs of Exceptions filed by Illinois Bell Telephone Company d/b/a SBC Illinois ("SBC"), Verizon North Inc. and Verizon South Inc. ("Verizon"), Citizens Telecommunications Company of Illinois ("Citizens") on May 23, 2003. Most of the arguments advanced by these parties are redundant, having been fully considered and rejected by the Proposed Order, as well as having been fully rebutted by the briefs filed during the course of this proceeding by AT&T, WorldCom, the Staff on the Illinois Commerce Commission, the

Wireless Coalition and various Competitive Local Exchange Carriers ("CLECs").[1] In the interest of brevity, AT&T/WorldCom address only certain arguments raised in the Briefs on Exception that have not been addressed by the Proposed Order or earlier briefs and that warrant additional argument.[2] The fact that AT&T/WorldCom do not address a specific argument should not be construed as and does not mean that AT&T/WorldCom agree with any such argument.

As predicted in the initial and reply briefs of AT&T/WorldCom, the parties in this case are divided into two broad camps. The first camp, which comprises all parties save two, generally support the Proposed Order. The second camp comprises Illinois' two largest monopoly providers of local telephone service. SBC proceeds on its transparent quest to be subject to as toothless a plan as possible, while at the same time seeking to saddle CLECs with as onerous a plan as can be conceived. While not taking quite as outrageous position as SBC, Verizon still posits that CLECs – who possess no bottleneck facilities and offer few, if any, wholesale services – should be subject to the same wholesale service plan as Level 2 incumbent providers. These two companies efforts to thwart the intent of Section 13-712(g) of the Illinois Public Utilities Act ("IPUA" or "Act") were properly rejected by the ALJ, and the Commission should do the same thing.

[1] A Joint Brief On Exceptions was filed by the following CLECs: McLeodUSA Telecommunications Services, Inc., Nuvox Communications of Illinois, Inc., RCN Telecom Services of Illinois, LLC and TDS Metrocom, LLC (hereafter collectively referred to as "Joint CLECs").

[2] AT&T did not file exceptions to the Proposed Order. Other parties, including WorldCom, filed exceptions. WorldCom's exceptions addressed issues related to the definitions of "wholesale service" and "wholesale special access" and Joint Competitive Industry Group ("JCIG") special access performance measures on which AT&T does not take a position. SBC and Verizon rehash arguments as to why the Commission should not require Level 1 carriers to report on special access performance measurements. WorldCom believes that the Proposed Order properly considered and rejected these arguments. WorldCom stands by the arguments it has advanced in testimony, briefs and its Brief on Exceptions that support the adoption of diagnostic special access performance measures for federally tariffed jurisdictionally mixed special access services, as well as the adoption of performance measures and remedies for special access services provided via state tariffs or contracts.

ARGUMENT

I. RESPONSE TO SBC'S EXCEPTIONS

A. The Commission Should Reject SBC's Unlawful Proposal to Tie the Rules to A Remedy Plan Not Part of the Record of This Case.

In an breathtaking change of position, SBC has tossed aside its prior proposal that all carriers, regardless of size, position in the market, and business, should be forced to adhere to the same performance remedy plan. Now, SBC strives to ensure that the Commission does the exact opposite thing – indeed something it stridently opposed in its testimony and briefs -- and incorporate into the final rules its most recent performance assurance plan adopted by the Commission, but not in a proceeding specifically addressing the issue like Docket No. 01-0120, but the non-binding voluntary plan recommended in the Section 271 case, Docket No. 01-0662. (SBC Exceptions, pp. 5-16). This change of position, of course, is not surprising; the performance assurance plan SBC now wants incorporated in the rule is the (ironically named) "Compromise Plan"[3], adopted as a purported Section 271 commitment in Docket No. 01-0662. As the Commission knows, in Docket No. 01-0662, over the objections of Staff and most CLEC participants, the Commission accepted as part of its Section 271 recommendation to the Federal Communications Commission ("FCC") SBC's "Compromise Plan".

The Proposed Order predates the Commission's Docket 01-0662 decision, and correctly requires that the initial remedy plan for the Tier 1 carriers should be the most

[3] The "Compromise" Plan was purportedly negotiated between a small CLEC, TDS MetroCom, and SBC. Not surprisingly, given the ineffective nature of the "Compromise" Plan, TDS did not start using the plan until the Commission "adopted" it in Docket No. 01-0662. *See*, Tr. p. 3580, Docket No. 01-0662. Indeed, prior to the Commission "accepting" this proposal in Docket No. 01-0662, no Illinois CLEC voluntarily agreed to be subject to the "Compromise" Plan. *Id*.

recent performance assurance plan for either Level 1 carrier adopted in a proceeding limited to such an examination, as provided in this rule's definition of a "pre-existing" plan. (Proposed Rule, §731.105). AT&T/WorldCom have consistently maintained that one plan should be used for each of the Tier 1 carriers, and that the rules should not contain something else. That is why AT&T/WorldCom support the provisions of the draft rule attached to the Proposed Order incorporating this requirement.

SBC hates this result. SBC wants the rule to instead be tied to a remedy plan adopted as part of a Section 271 recommendation that is entirely under SBC's control, not ever mentioned in the record of this case, and according to SBC itself is one that has not even been issued as part of a binding decision.

SBC's agenda is furthered in two places. The first is in the Order. SBC proposes that the Commission Order literally cede the ability to make changes to SBC's remedy plan, and instead tie it to the "process" established in its "voluntary" remedy plan accepted in Docket No. 01-0662. Specifically, SBC urges that the Commission find:

> There is no need to direct SBC Illinois to file a proposed performance assurance plan, or to establish procedures for reviewing that proposal, because SBC Illinois has already filed its proposal and the Commission has already completed its review. There is no need to specify the timing of future "review proceedings" to consider modifications to the plan, because the Commission's order in Docket No. 01-0662 has already directed that such a review will take place in three years. In short, there is no need to establish a separate rule for SBC Illinois here. All the Rule need do now is accommodate, without interfering with, the Section 271 Plan. Further, as SBC Illinois points out the creation of a "rule" applicable to SBC Illinois alone would raise serious statutory questions. Accordingly, the Commission adopts SBC Illinois' proposed language eliminating the separate classification for Level 1 Carriers. (SBC Exceptions, p. 11).

The second place is in other various language SBC offers, both to be added to the rule and in the final order, tying the rule to the Section 271 order remedy plan recommendation and, notably, eliminating the requirement that the remedy plan used as its starting plan for this case be the plan more recently adopted in a docket specifically examining the issue, namely Docket No. 01-0120. (See, SBC Exceptions, pp. 12, 14-16).

SBC's language is, on its face, unlawful, inconsistent with the evidence in this case, and constitutes exceptionally poor policy. SBC's proposal is *unlawful* because the "Compromise Plan" never was addressed in this case. The record is entirely silent on this plan, other than SBC's exceptions. No copy of this plan has been examined here and no testimony exists discussing it or any of its provisions. It is therefore illegal for the rule to even mention this plan, and to do so would lead to rejection of the rule by the General Assembly's Joint Committee on Administrative Rules ("JCAR"), and in the unlikely event it survives that review, would render the rule *per se* reversible error on appeal.

Even if the "Compromise Plan" were part of the record of this case, however, it still would not survive JCAR scrutiny as it makes a Commission rule contingent, in the future, upon a "voluntary" performance assurance plan adopted in an order that, according to SBC, is entirely nonbinding.

In *Indiana Bell Tel. Co. v. IURC, Order on Cross Motions for Summary Judgment,* slip op. at pp. 23-24, Docket No. 1:02-CV-1772-LJM-WTL (Dist. Ct., S.D.Ind 2003), United States District Court Judge Larry J. McKinney adopted SBC's position that state public utility commissions are entirely without the legal ability to impose a performance assurance plan in a Section 271 proceeding, instead ruling that the state commission order in such a docket is merely a nonbinding recommendation. While

AT&T/WorldCom believe this decision is erroneous, and is appealing it to the United States Court of Appeals for the Seventh Circuit, nevertheless SBC certainly agrees with this result, since it was what it argued in that case and it is currently defending that decision on appeal. This necessarily means that SBC believes that the Commission's remedy plan adopted in Docket No. 01-0662 is advisory in nature and the Commission's decision adopting the "Compromise Plan" in Docket No. 01-0662 is merely a recommendation, and therefore not something that can be imposed upon the parties. As a result, SBC is recommending that the Commission here should find that something that was issued in an order with no binding legal effect should "trump" rules adopted in a binding rulemaking and an earlier binding decision in Docket No. 01-0120 that are both expressly contemplated by state law. This, alone, renders SBC's exceptions unlawful.

SBC's proposed language also is factually incorrect and, if adopted, would be poor public policy. Not only is there no record evidence supporting SBC's language referencing the Docket No. 01-0662 "Compromise Plan", but the evidence overwhelmingly shows that placing SBC in Tier 2 (because SBC wants to eliminate Tier 1) would be extraordinarily harmful.

First, as discussed by various parties throughout this proceeding both the Act and federal law impose distinctly different legal responsibilities on different telecommunications carriers.[4] SBC ignores the law's recognition that SBC and Verizon are very different kinds of carriers than a small Incumbent Local Exchange Carrier ("ILEC").

[4] *See, e.g.*, AT&T Brief, pp. 3-6.

Second, SBC's proposal ignores business reality, whatever the legal requirements. The two largest ILECs in this state are SBC and Verizon. Indeed, these two carriers are the nation's largest telephone companies, each with operations in many states. It is in the serving areas of these two companies that CLECs have entered or are likely to enter the and compete in the local exchange market. Any rule adopted here appropriately addresses these two mammoth entities differently than smaller, primarily rural carriers. SBC's proposal to eliminate Tier 1 purposefully ignores this reality.

Third, SBC's proposal ignores the big difference between it and Level 2 carriers, which are ILECs such as Citizens and Illinois Consolidated Telephone Company. Level 2 carriers serve a small fraction of the access lines possessed by SBC and Verizon. Level 2 carriers do not currently have the levels of competitive entry that SBC has, given the size and rural characteristics of their serving areas. Certainly, there is no valid factual or public policy aim calling for elimination of Level 1 as a separate category, as SBC proposes.

Fourth, the Proposed Order and the attached rule do provide for a successor plan to be used, and that is only appropriate, since (1) the Docket No. 01-0662 Plan is, according to SBC, not binding on the company and hence is not under the ultimate control of the Commission but instead in the "good graces" of SBC; and (2) if the 01-0120 plan were vacated by a reviewing court for grounds other than its purported expiration date, this would allow a new plan to be implemented in due course pursuant to the rules' terms. It therefore would be unwise not to at least have the option that a follow-up plan can be adopted within a reasonable time after the rule is promulgated.[5]

B. The Proposal of SBC, Verizon and Citizens to Limit the Application of the Rule to "Basic Local Exchange Services" Should Be Rejected.

SBC proposes that the rule only apply to "basic local exchange service", replacing the rule's more general (and legally accurate) term "telecommunications service". Similarly, SBC requests that the rule not define the "high frequency portion of the loop" or "HFPL", and delete references to "line splitting". (SBC Exceptions, pp. 12-13). In support of these changes, SBC argues – as did Verizon and Citizens in their exceptions[6] -- that Section 13-712, by its very terms, ties the Commission's hands to adopting wholesale service quality rules that only apply to end user "basic local exchange services".

SBC, Verizon and Citizens are wrong. Not only do they misread Section 13-712, they ignore the more important fact that Section 13-712 does not exist in a vacuum. Section 13-801 explicitly confers jurisdiction upon the Commission to require that ILECs "shall provide a requesting telecommunications carrier with interconnection, collocation, network elements, and access to operations support systems on just, reasonable, and nondiscriminatory rates, terms and conditions to enable the provision of ***any and all***

[5] This means, of course, that the review period of the rule may need to be extended a bit into the future. AT&T/WorldCom recommend that the date be changed to April 1, 2005.
[6] *See,* Verizon Exceptions, pp. 5-7; Citizens Exceptions, pp. 3-5. In a remarkable example of prescience, Citizens further argues, based upon some news releases, that the FCC will soon issue an order preempting the states' ability to require that ILECs offer line sharing or make HFPL an UNE. (Citizens Exceptions, pp. 3-5). The FCC has not issued such an order, and it is quite possible that the states will not be expressly preempted from requiring the ILECs to offer line sharing or make HFPL available as an UNE. The Commission would be foolish to presume such an intent in the absence of any FCC decision.

existing and new telecommunications services within the LATA, including, but not limited to, local exchange and exchange access."[7]

The Commission has interpreted Section 13-801 and the other pro-competitive provisions of the Act to require SBC to unbundle and provide a broad array of wholesale services that allow CLECs to provide other than basic local exchange services. For example, the Commission ruled in 2002 that SBC is required to provide a whole array of network elements that allow for the provision of numerous advanced services.[8] The Commission specifically included line splitting in the list of UNEs. Line splitting allows CLECs to offer both competitive basic local exchange service and competitive advanced DSL services. As part of requiring this functionality, the Commission also mandated certain provisioning intervals for this offering.[9]

SBC's restrictive reading of Section 13-712 also is directly contrary to basic rules of statutory construction, as Staff explained in its initial Brief.[10]

Indeed the proposal of SBC, Verizon, and Citizens to limit the rule to basic local exchange services, while seemingly minor, if adopted would gut the entire rule. This is because wholesale services provided from one carrier to another are not basic local exchange telecommunications services. They are a broad range of wholesale services that allow the CLEC to provide telecommunications services to its customers. The Part 731 rule governs the *wholesale* services provided by ILECs to CLECs, and not the resultant *retail* services the CLECs offer to end users.[11]

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[7] 220 ILCS 5/13-801(a), (emphasis supplied). *See, also,* Brief of AT&T, pp. 3-6.
[8] *See,* Order, Docket No. 01-0614, pp. 30-33 (June 11, 2002).
[9] *Id.*, pp. 167-168.
[10] Brief of Staff, p. 37.
[11] Reply Testimony of AT&T Witness Moore, pp. 20-21.

AT&T/WorldCom agree with the Staff's policy analysis that carriers purchasing wholesale services need wholesale service quality measurements and associated remedies to apply to more than just basic local exchange services. As Staff correctly stated: "The point here is that to restrict the wholesale measures to basic local exchange service would be to eliminate a range of services needed by many CLECs to foster and protect competition. Such a construction of Section 13-712 is contrary to the pro-competitive goals of HB 2900, of which Section 13-712 was a part."[12]

These proposals of SBC, Verizon, and Citizens therefore are inconsistent with the Illinois statute and Illinois policy and should be rejected. The Proposed Order's language should remain unchanged.

C. SBC's Extra-Record Proposal to Add Onerous Wholesale Rules to CLECs Should Be Rejected.

SBC makes two primary arguments supporting its agenda to increase the scope and level of any wholesale quality plan to be adopted for CLECs (while, ironically, seeking emasculation of any rule that applies to itself). SBC makes two proposals, both of which should be rejected.

SBC first asserts that Level 4 providers (the CLECs) should be subject to increased wholesale remedy levels, with fines reaching $25 per occurrence. (SBC Exceptions, pp. 25-28).[13] According to SBC, this level of *wholesale* fine is necessary because of Section 13-712's discussion of remedies for failure to provide adequate *retail* service to end users. This contention can be easily dismissed. While SBC cites to

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[12] Staff Brief, pp. 37-38.

[13] Verizon makes a similar argument, arguing that if Level 2 ILECs should pay $25 per occurrence, so should CLECs. (Verizon Exceptions, Exhibit A, p. 9). For the reasons stated relating to SBC, the Commission should also reject Verizon's proposal.

Verizon's brief and reply briefs, it cites to no record evidence in support of this proposal, for the simple reason that no such evidence exists. No SBC witness (or Verizon – or any other witness -- for that matter) provided testimony supporting this radical proposal. Thus, the rule cannot contain such language. Even if there were evidence offered on this issue, Section 13-712(e) rebuts the necessity of providing such draconian fines to CLECs. SBC "omits" mentioning that Section 13-712(e) applies to retail remedies for offering poor service, and does not, by its very terms, apply to wholesale services. Moreover, if a CLEC does a poor job porting a customer, for example, to another provider, the parties' interconnection agreements govern this relationship. In contrast, if SBC offers poor wholesale service to a CLEC, typically interconnection agreements cite to the state-ordered performance assurance plan.

Most astounding, however, is the fact that SBC proposed *in this case* that it only be subject to a $1 per occurrence remedy if it offered poor service to CLECs. (SBC's Proposed Rule, §731.610 attached to its Brief). Somehow SBC thinks it is acceptable for a monopoly provider like itself to pay $1 per occurrence for services the CLEC need to stay in business, but somehow CLECs should pay $25 for services the ILECs really do not need. This shows, more than anything, that SBC's real agenda is little more than fostering anti-competitive mischief, and should be rejected out of hand.

SBC's second proposal is to attempt to impose a severe number portability requirement on CLECs. (SBC Exceptions, pp. 29-31). SBC proposes that CLECs should be required to port numbers in less than 24 or 48 hours (for less than and more than 20 numbers, respectively). This proposal, however, is a solution in search of a problem. If CLECs do not port numbers to the ILECs on a timely basis, their interconnection agreements govern the necessary business relationship. In contrast, as stated above, SBC/CLEC interconnection agreements typically cite back to the state-ordered remedy plan for SBC's wholesale service problems.

SBC's points are, in any event, broadly inaccurate. The evidence in this case shows that CLECs are not, today, wholesale providers. For example, AT&T/WorldCom do not offer wholesale services such as UNEs – other than activities associated with switching customers -- to SBC. Indeed, AT&T has never even had a request for a UNE or any other similar services. The reason is simple: AT&T/WorldCom and other CLECs do not possess a bottleneck monopoly over any portion of the local exchange market.

Interestingly, SBC's own testimony defeats its proposal. The only "services" SBC can point to that are purportedly offered by CLECs are where the company successfully wins back a customer. (SBC Witness Spieckerman Direct, p. 3). Thus, in only two limited circumstances (provision of customer service records and firm order confirmations) can SBC even assert a need for some sort of wholesale service quality assurance.[14]

II. RESPONSE TO VERIZON'S EXCEPTIONS

A. Remedy Plans Should Be Tariffed

Verizon opposes the requirement, contained in Part 731.200 of the Proposed Order's rule, that remedy plans be tariffed. (Verizon Exceptions, pp. 21-27). Verizon's primary contention is that tariffing is somehow not allowed under the law. Recent case law shows that Verizon is incorrect. In *Michigan Bell Telephone Co. v. MCI,* 323 F.3d 348 (6th Cir. 2003; reh. den., June 5, 2003), the Sixth Circuit rejected the argument that

[14] Reply Testimony of AT&T Witness Moore, p. 5.

the Telecommunications Act of 1996 preempts all state law tariffs establishing interconnection obligations outside of the interconnection agreement process. The instant case is even stronger. This proceeding is being done pursuant to a state law that furthers competition,[15] whereas the *Michigan Bell* decision was merely a Michigan Public Service Commission order.

The Proposed Order's tariffing requirement is also good public policy. Having the detailed remedy plans for Level 1 carriers contained in a tariff provides an excellent reference point to any new CLECs entering the market, and also allows the Commission to carefully monitor the plans, including efforts to change their terms.

B. All Carriers Should Not Be Held to the Same Performance Measures

Verizon proposes that CLECs (Level 4 carriers) should automatically be subject to the same wholesale service rules as Level 2 carriers. (Verizon Exceptions, pp. 27-29). Verizon does not present any kind of support for its proposal other than contending that the record does not support use of a separate Level 4 classification. Verizon ignores the evidence. Both AT&T Witness Moore and McLeodUSA/TDS Metrocom witness Cox testified that classifying CLECs in the same fashion as Level 2 ILECs does not accomplish any kind of valid public policy goal.[16]

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[15] It goes without saying that Section 13-712 exists to further competition in Illinois, and is therefore consistent with the requirements of the Telecommunications Act of 1996. This stands in contrast to state action that attempts to reduce the level of competition, such as the infamous "SBC Law" that, one hopes, is on the road to oblivion.

[16] Reply Testimony of AT&T Witness Moore, p. 19.

Indeed, there is no compelling business reason to impose Level 2 requirements on CLECs, since they do not provide wholesale services, as was discussed earlier in this brief. AT&T/WorldCom refer specifically to Mr. Cox's testimony, where he cogently explains:

> Since CLECs, unlike Level 1 and Level 2 Carriers (which are ILECs) have not enjoyed the benefits of many decades of state mandated monopoly protection, and are in fact engaged in the difficult task of competing with those ILECs, there is no compelling reason to subject a CLEC to regulation of any wholesale service it may voluntarily choose to provide. If a purchasing carrier is dissatisfied with the wholesale service provided by a CLEC, the carrier will virtually always have at least one other option: it can obtain the service from the ILEC. Of course where an ILEC is providing the wholesale service it is usually doing so under compulsion of Section 251 of the Telecommunications Act, and the purchasing carrier usually has no other choice, which creates the entirely logical (and absolutely essential) need for regulation of the ILEC's quality of wholesale service. This is in stark contrast to a situation in which a CLEC voluntarily seeks to offer wholesale services to another carrier. The two carriers are able to negotiate a contract for such services, which may include service level agreements.[17]

There is no valid reason – legal, policy or factual -- to impose Level 2 performance measurements and remedies on CLECs. Verizon's proposal should be rejected.

III. EXCEPTIONS OF OTHER PARTIES

AT&T/WorldCom support Staff Exceptions 1, 2, 3, 6, 8, 9, 15, 18 (Section 731.230 Tariff requirements), 18 (Section 731.305(f) Regular intervals), and 19.

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[17] Direct Testimony of McLeodUSA/TDS Metrocom Witness Rod Cox, pp. 6-7.

AT&T/WorldCom support these changes for the reasons stated by the Staff. AT&T/WorldCom do not take a position on Staff's other exceptions.

WorldCom and the CLECs took exception to the Proposed Order's requirement that CLECs should be subject to specific measures, standards and remedies for customer service record return, loss notification, and unbundled loop returns, noting that these requirements were adopted because there was no evidence indicating that the CLECs cannot meet them. (WorldCom Exceptions, pp. 1- 4; CLECs' Exceptions, pp. 3-9). AT&T joins in and supports these exceptions.

CONCLUSION

The Commission should adopt the Proposed Order's wholesale service quality rules, with the modifications proposed by Staff, WorldCom, and the Joint CLECs, as discussed herein.

Respectfully submitted,

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